BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LOUISE E. PETERSON Claimant	)	
VS.	)	
SODEXHO, INC. Respondent	)	Docket No. 1,008,695
AND	)	
INSURANCE COMPANY OF STATE OF PENNSYLVANIA Insurance Carrier	)	

ORDER

Claimant requested review of the October 23, 2006 Award entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on February 16, 2007.

APPEARANCES

Stephen J. Jones, of Wichita, Kansas, appeared for the claimant. Ryan Weltz, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found that claimant suffered no lost time and no permanent impairment from the accidental injury that occurred on April 12, 2002. In regard to the May 3, 2002, date of injury, the court found that claimant suffered a 16.2 percent functional impairment to the whole body for injuries to her shoulders, low back, and left knee. The ALJ concluded that claimant had a task loss of 39 percent. The ALJ determined that claimant had a pre-injury average weekly wage (AWW) of $393.11 and a

post-injury earning capacity of $366.70 per week and that claimant was capable of earning wages within 90 percent of those she was earning at the time of her accidents. The ALJ also concluded that claimant failed to establish that she made a good faith effort to find alternative employment at or near the wages earned at the time of her injuries. Accordingly, claimant was denied a permanent partial disability award based upon work disability and, instead, granted an award of benefits based upon a 16.2 percent impairment of function to the body as a whole.

Claimant requests that the Board modify the Award to find that claimant is entitled to work disability. Claimant contends that claimant exercised a good faith effort to find comparable employment after her termination from respondent. Claimant asserts that the ALJ should therefore have used her actual earnings to compute her post-injury earning capacity rather than a speculative wage earning ability developed by Karen Terrill. Claimant argues that the ALJ should not have considered the permanent partial impairment rating of Dr. Severud since he did not consider the injuries to claimant's low back in that rating. Claimant likewise argues that the ALJ should not have considered the task loss opinion of Dr. Erik Severud, since he did not include any restrictions for claimant's low back.

In its brief, respondent argued that the Board should find that claimant had a preinjury AWW of $306.39, but during oral argument to the Board, AWW was withdrawn as an issue for the Board's review. Instead, both claimant and respondent agreed with the findings of the ALJ concerning claimant's preinjury AWW with respondent. Respondent requests that the Board limit claimant's award of functional disability to 11.2 percent based on the opinions of Dr. Severud and Dr. Philip Mills. In the alternative, respondent asks the Board to affirm the decision of the ALJ in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Respondent is a food service business that contracted with McPherson College. Claimant worked for respondent at McPherson College as an assistant manager and safety coordinator. She claimed two dates of accident, April 12, 2002, and May 3, 2002. On April 12, 2002, claimant cut her finger cutting vegetables and when she did, she jerked her arm back. She claimed injuries to her shoulder. She lost no time for this injury, and the ALJ found that she suffered no permanent impairment from the incident. This finding has not been appealed.

Claimant's next date of accident was on May 3, 2002, when she slipped on a piece of food on the floor and fell. She claimed injuries to her back, shoulders and knees from the incident on May 3, 2002.

While working at respondent, claimant earned $8.50 per hour plus vacation benefits and some other minor fringe benefits such as free meals while working and a discount on her work shoes. There was no testimony concerning the value of those benefits. A wage statement submitted by respondent covered a period from September 7, 2001, through March 29, 2002. That wage statement indicated that claimant was considered a full time employee, although she did not always work a 40-hour week. The ALJ's award found that the wage statement shows claimant worked 33.3 hours overtime. Claimant testified that during the weeks between March 29, 2002, and the date of her May 3, 2002, injury, she worked an average of 15 hours per week overtime. The ALJ added those hours of overtime to claimant's pre-injury AWW.

Claimant testified that after her fall on May 3, 2002, she went to Dr. Erik Severud. Dr. Severud treated her with cortisone shots in both shoulders and both knees. On July 11, 2003, she had surgery on her left knee for a torn meniscus. Claimant continued to have complaints about her back. Dr. Severud did not treat backs, however, so she was referred to Dr. Alan Moskowitz for treatment to her back. Dr. Moskowitz took some x-rays and referred her to Dr. Mark Kirsch, who did a facet joint injection.

Claimant was given temporary restrictions by Dr. Severud of no lifting over 30 pounds, no overhead lifting, no squatting, and no kneeling. Claimant testified that her supervisor at the time, Richard Sabatos, was good about working with her to stay within her restrictions. She had to have help lifting and could no longer get down on her knees. Respondent terminated claimant on September 16, 2002, for reasons not related to her injuries.

Claimant began working for the school district in Moundridge, Kansas, in August 2003 as a paraeducator earning $6.96 per hour working 36 hours a week for a gross AWW of $250.56. She had some physical problems performing this job, mainly when she had to walk across the campus and especially if she was carrying books. Claimant stopped working for the school district in December 2004 because it was costing her too much for gas to drive to and from Moundridge from her residence in McPherson and she was offered a job at the McPherson Museum for more money per hour but fewer hours per week. Claimant started at $7.50 per hour at the museum and was raised to $7.75 per hour. She works a 20-hour week for a gross AWW of $155. She will occasionally work some additional hours but not very often.

Claimant continues to have problems from her knees to her neck. She states that her right knee is doing well but that her left knee continues to hurt and has caused her to limp. Dr. Severud told her she may need knee replacement surgery on her left knee, but that was not a current recommendation. She cannot stand for long periods of time. Her shoulder condition has gotten worse. Her back condition was better for awhile but started hurting again, although the pains are not as sharp.

Dr. Severud last saw claimant on June 6, 2006. At that time, Dr. Severud found claimant to be at maximum medical improvement (MMI). He opined that claimant had injuries to her left knee and both shoulders that were directly related to her work injury, *i.e.*, bilateral shoulder pain, impingement syndrome of bilateral shoulders, medial meniscus tear of the left knee, chondromalacia of the left knee, and right knee pain. However, claimant also had conditions that were not related to her accident, including calcific tendinosis of the left shoulder, adhesive capsulitis of the right shoulder, and osteoarthrosis of the left knee.

Dr. Severud found that claimant sustained permanent partial impairment to both shoulders and to her left knee. Using the AMA *Guides*,[1] he found she had a 2 percent permanent partial impairment to the left lower extremity. In addition, he assigned claimant a 1 percent permanent partial impairment for an exacerbation of her preexisting chondromalacia and osteoarthrosis of the left knee. This converted to a 1.2 percent whole body impairment. In regard to claimant's shoulders, Dr. Severud found she had an 8 percent permanent partial impairment to each upper extremity based upon range of motion. This would convert to a 5 percent permanent partial impairment to the body as a whole for each shoulder. Using the Combined Values Chart, claimant's total whole body impairment would be 11.2 percent. Since Dr. Severud did not treat claimant for her back, he did not rate her impairment for her back condition. Likewise, Dr. Severud did not impose any restrictions for claimant's back condition.

Dr. Severud assigned claimant permanent work restrictions, primarily for her shoulders, of maximum lifting, carrying, pushing and pulling to 30 pounds, limited to 20 pounds on an occasional basis and 10 pounds on a frequent basis. He recommended claimant use her arms above shoulder height only on an occasional basis. With regard to claimant's knees, although Dr. Severud found that the work injury of a meniscus tear and a minor exacerbation of preexisting arthritis resulted in subjective pain, he found that any limitations of function are a result of her preexisting condition. He did not recommend formal restrictions on claimant's use of her knees from the standpoint of her work-related injury.

Dr. Severud reviewed a task list prepared by Karen Terrill. Of the 40 unduplicated items on the list, Dr. Severud opined that claimant was unable to perform 14 for a task loss of 35 percent. He also reviewed the task list prepared by Mr. Hardin and opined that of the 32 unduplicated tasks, claimant was unable to perform 10 for a 31 percent task loss.

Dr. Philip Mills, who is board certified in physical medicine and rehabilitation and independent medical evaluations, examined claimant on May 7, 2003, per order of the ALJ. Dr. Mills was asked whether claimant's back condition was causally related to her accident and for his recommendations for treatment with reference to claimant's back complaints.

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

If Dr. Mills found claimant at MMI, he was asked to offer his opinion on claimant's permanent impairment of function.

Claimant reported to Dr. Mills that her back pain was greater on the right lower side of the back and occasionally the pain shoots upward. She also complained of low and mid back pain. Upon examination, Dr. Mills found claimant had a marked compensatory lumbar lordosis in a standing position. The shoulders were symmetric but mildly rounded. He noted a very mild limp secondary to her knees. She had a more marked limp to the left with tiptoe walking and with heel walking. She reported tenderness over the right LS paraspinals. There was also tenderness over the right lateral iliac crest. He diagnosed her with back pain and right lateral iliac crest tenderness. Dr. Mills opined that although claimant reported chronic back pain for years, the right lateral iliac crest tenderness is new and is probably related to claimant's fall.

Dr. Mills found that claimant was at MMI. Using the AMA *Guides*, Dr. Mills assigned claimant a diagnosis related estimate (DRE) lumbosacral Category I impairment causally related to her fall, which would be a 0 percent impairment to the whole body. Dr. Mills stated that he did not address the issues of claimant's knees or shoulders but only rated her back condition. He did not address the problems claimant had with a limp. Dr. Mills did not recommend an MRI or further work up. He recommended aquatic workouts, a heating pad, and weight loss.

Dr. Mills testified that claimant did not report a neck condition to him, only low and mid back pain. He recommended that she have restrictions based on her knees and shoulders but no additional restrictions for her back. He deferred to Dr. Severud relative to restrictions for claimant's knees and shoulders. In reviewing Ms. Terrill's task list, Dr. Mills stated that there were no tasks outlined on the list that he would eliminate because of restrictions imposed on claimant due to her back complaints.

Dr. George Fluter evaluated claimant on July 5, 2005, at the request of claimant's attorney. He is board certified as an independent medical examiner, and also in physical medicine and rehabilitation, and in internal medicine. Claimant complained to Dr. Fluter of pain affecting her head, neck, back, shoulders, hands, knees and toes. She reported she always has an aching pain. But sometimes the pain is sharp and burning. She has numbness, but it is not constant. She told Dr. Fluter that she experiences weaknesses and that sometimes her left knee will go out on her, but she has not fallen.

Upon examination, Dr. Fluter found that claimant's cervical range of motion was within functional limits. Bilateral shoulder range of motion was within functional limits. There were areas of tenderness to palpation in the muscles of the neck, upper shoulders, scapular stabilizers, lumbar paraspinal muscles, buttocks, bicipital tendons and subacromial areas bilaterally. There was some soft tissue fullness about the left knee as compared to the right knee. There was tenderness to palpation along the left patellar

tendon and the medial and lateral joint lines of the left knee. Dr. Fluter diagnosed claimant with neck pain; myofascial pain affecting the neck, upper shoulders, and scapular stabilizers; low back pain; myofascial pain affecting the lower back and buttocks; bilateral shoulder pain; left knee pain; and status post left knee arthroscopy with partial medial menisectomy and chondroplasty of the medial femoral condyle and patella.

Using the AMA *Guides*, Dr. Fluter found claimant had a 9 percent permanent partial impairment to the right upper extremity and a permanent partial impairment to the left upper extremity of 7 percent for shoulder range of motion deficits. This converted to a 5 percent permanent partial impairment to the whole body for the right upper extremity and a permanent partial impairment to the whole body of 4 percent for the left upper extremity. Dr. Fluter also found claimant had a permanent partial impairment to the left lower extremity of 20 percent for moderate flexion contracture at the knee, which was equivalent to a permanent partial impairment to the whole body of 8 percent. He found claimant had a DRE cervicothoracic Category II impairment of 5 percent to the body as a whole. He also found that claimant had a DRE lumbosacral Category II impairment of 5 percent to the body as a whole. Using the Combined Values Chart, Dr. Fluter found claimant had a permanent partial impairment to the whole body of 24 percent.

Dr. Fluter recommended that claimant restrict lifting, carrying, pushing and pulling to 20 pounds occasionally and 10 pounds frequently; avoid holding her head and neck in awkward positions; restrict activities at or above shoulder level to an occasional basis; restrict bending, stooping and twisting to an occasional basis; and avoid squatting, kneeling, crawling and climbing.

Dr. Fluter reviewed the task list prepared by Mr. Hardin and testified that he would agree with Mr. Hardin's indications of what tasks claimant would or would not be able to perform based on restrictions Dr. Fluter gave claimant. Of the 32 unduplicated tasks, Dr. Fluter believed claimant was unable to perform 16 for a 50 percent task loss.

At the request of respondent, claimant met with Karen Terrill on April 13, 2006. Together, they prepared a list containing 40 unduplicated tasks that claimant performed in the 15-year period before her work-related injuries. Ms. Terrill testified that claimant retained the skills and physical ability to perform work. She said that claimant could work as a first line supervisor and manager of food preparation. Those occupations would pay between $10.44 and $11.23 per hour in the McPherson, Kansas, area.

Jerry Hardin met with claimant on August 30, 2005, at the request of claimant's attorney. Together they compiled a list of 32 tasks claimant had performed in the 15 year period before her work-related accidents. He did not discuss with claimant any effort she made to secure jobs. He believed that claimant could work as a telemarketer or work in retail sales and was capable of earning $300 a week, considering her education, training and work experience.

Permanent partial disability under K.S.A. 44-510e(a) is defined as the average of the claimant's work task loss and wage loss. But, it must first be determined that a worker has made a good faith effort to find appropriate employment before the difference in pre- and post-injury wages based on the actual wages can be used. If it is determined that a good faith effort has not been made, then an appropriate post-injury wage will be imputed based on all the evidence, including expert testimony concerning the capacity to earn wages.[2]

The Kansas appellate courts have also interpreted K.S.A. 44-510e(a) to require workers to make a good faith effort to continue their employment post injury. The courts have held that a worker who is capable of performing accommodated work should advise the employer of his or her medical restrictions and should afford the employer a reasonable opportunity to adjust the job duties to accommodate those restrictions. Failure to do so is evidence of a lack of good faith.[3] Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt, voluntarily quits, or is terminated from a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage where the termination is for reasons that demonstrate a lack of good faith by the worker.[4]

In *Bohanan,*[5] the court found claimant's refusal to perform jobs that were outside her restrictions or were temporary or that would not restore her to a wage that was comparable to her preinjury wage did not constitute a lack of good faith so as to invoke the policy considerations of *Foulk*.[6] Therefore, *Bohanan* was not denied a work disability award.

The Kansas Court of Appeals in *Watson*[7] reiterated that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the court held that

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[2] *Copeland v. Johnson Group, Inc.*, 26 Kan. App. 2d 803, 804, 995 P.2d 369 (1999), *rev. denied* 269 Kan. 931 (2000).

[3] *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000); *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999)

[4] See, *e.g.*, *Beck v. MCI Business Services, Inc.*, 32 Kan. App. 2d 201, 83 P3d 800, *rev. denied* 276 Kan. 967 (2003); *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998)*;Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* 265 Kan. 884 (1998).

[5] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 877 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995)

[7] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[8]

Furthermore, unemployment or job change due to economic change, such as a layoff, can result in a work disability.[9] In *Lee*,[10] it was stated:

> It is not the intent of the legislature to deprive an employee of work disability benefits after a high-paying employer discharges him or her as part of an economic layoff where the employer was accommodating the injured employee at a higher wage than the employee could earn elsewhere.

Retaining an employee in a job that pays a comparable wage artificially avoids a work disability until the worker is exposed to the open labor market wherein a work disability may be revealed.[11]

The ALJ found claimant failed to prove she made a good faith effort to find appropriate employment after her termination from her employment with respondent on September 16, 2002. Claimant did find employment as a paraprofessional in August 2003, but she voluntarily quit that job to work at another job that was only part-time. Working part-time when no physician has restricted the number of hours per week that can be worked is not good faith.[12] Furthermore, there is no indication that claimant is continuing to look for full time employment while working part time at the museum. And although claimant had knee surgery after she was terminated by respondent and before she started working for the Moundridge school district, there is no evidence whether or for how long she was unable to work due to that surgery. Moreover, the record is almost silent

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[8] *Id.* at Syl. ¶ 4.

[9] *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 975 P.2d 807 (1998).

[10] *Lee v. Boeing*, 21 Kan. App. 2d 365, Syl. ¶ 3, 899 P.2d 516 (1995).

[11] *Roskilly v. Boeing Co.*, 34 Kan. App. 2d 196, 116 P.3d 38 (2005); *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999); *Watkins v. Food Barn Stores, Inc.*, 23 Kan. App. 2d 837, 838-39, 936 P.2d 294 (1997).

[12] See *Graham v. Dokter Trucking Group*, 36 Kan. App. 2d 521, 141 P.3d 1192 (2006). But see *Anderson v. Victory Junction Restaurant*, No. 95,871 (unpublished Court of Appeals opinion filed October 27, 2006).

concerning claimant's job search efforts during that approximately 11-month period she was unemployed. Claimant said she was looking for work during her March 21, 2003, deposition, but except for mentioning writing a letter to a single prospective employer, she does not say where she was looking, how many contacts she was making per week, what the prospective jobs paid, what type of work she was applying for, etc. Claimant does discuss the two jobs she worked after leaving respondent, but there is no discussion of her job search efforts during her May 4, 2006, Regular Hearing testimony or at her June 2, 2006, deposition. Based on this record, the Board is unable to determine claimant made a good faith effort to find appropriate employment. Moreover, based upon the expert vocational testimony, claimant retains the ability to earn 90 percent of her preinjury AWW. Therefore, she is ineligible for an award of permanent partial disability based on work disability. The Award entered by the ALJ is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated October 23, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Stephen J. Jones, Attorney for Claimant
Ryan Weltz, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge